IN THE SUPREME COURT OF FLORIDA

MICHAEL ZACK,

Appellant,

v. Case No. 92,089

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 0271543
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR APPELLANT

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PRELIMINARY STATEMENT

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ARGUMENT

ISSUE I

THE COURT ERRED IN ADMITTING EVIDENCE THAT ZACK HAD MURDERED LAURA ROSILLO AND STOLE GUNS FROM BOBBY CHANDLER AS SUCH EVIDENCE HAD NO RELEVANCE TO THE CHARGED OFFENSES, WHATEVER RELEVANCE THEY HAD WAS OUTWEIGHED BY THEIR PREJUDICIAL IMPACT, AND ONLY DEMONSTRATED ZACK'S CRIMINAL PROPENSITIES, IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

1. **The Williams Rule offenses had no pervasive similarities with the charged crimes.**

The State, on pages 30-33 argues the Rosillo rape/murder and Chandler theft were admissible as "traditional" Williams rule evidence. That is, they qualified under Section 90.404(2)(a), Florida Statutes, because "The charged and collateral offenses must not only be strikingly similar, but they must also share some unique characteristic or combination of characteristics which sets them apart from other offenses." Heuring v.

State, 513 So. 2d 122, 124 (Fla. 1987). Zack never claimed the Rosillo murder had to be "absolutely identical" to the Smith murder. Gore v. State, 599 So. 2d 978, 984 (Fla. 1992) ("This Court has never required the collateral crime to be absolutely identical to the crime charged.") In Gore the similarities were pervasive and the dissimilarities insubstantial. In contrast, in this case the similarities, singly or taken together, have no special, unusual character that point to Zack. Also in contrast to Gore, the dissimilarities pervading the State's evidence destroy any relevance of the Rosillo murder and Chandler thefts to this case.

On page 31, the State's brief says, well, if we lump all of Zack's criminal activity together from the theft of the car in Tallahassee to the murder of Smith in Pensacola, we see a "pattern of conduct." No, if we do as the State contends, we see only Zack's bad character and criminal propensity.[1] In Bolden v. State, 543 So. 2d 423 (Fla. 5th DCA 1989), the Fifth District rejected the same argument for the same reasons Zack argues here. "On appeal, the state argues that the testimony was admissible to show a 'pattern of conduct' by Bolden. That is exactly why the evidence was inadmissible." It is also exactly why it was inadmissible in this case.

[1] How the previous thefts and murder show Zack's intent to rape Smith and rob her is a mystery.

On page 32 of its brief the State relies on this Court's opinion in Wuornos v. State, 644 So. 2d 1000, 1006-1007 (Fla. 1994), because this Court had approved the lower court's admitting evidence Wuornos had killed six other men. This evidence tended to rebut her claim she had acted without premeditation and in self-defense. Significantly that evidence passed the strict similarity requirement imposed for evidence admitted under Section 90.404(2)(a), Florida Statutes. "The nature of the various crimes was relevant in establishing a pattern of similarities among the homicides" Id. at. 1007. (Emphasis supplied). As argued in the Initial brief, pages 19-24, the points of similarity between the Rosillo and Smith murders had no special character or were so unusual as to point to the defendant. Drake v. State, 400 So. 2d 1217, 1219 (Fla. 1981). Moreover, the dissimilarities were numerous and significant, which distinguishes this case from Gore v. State, 599 So. 2d 978, 984 (Fla. 1992)(See Initial Brief at page 21).[2] Wuornos, thus, has no significant importance to this case because the general relevancy statute, Section 90.402, Florida Statutes, controls this issue (if at all) rather than Section 90.404(2)(a) Florida Statutes, which governed this Court's reasoning in that case. See, Perez v. State, 23 Fla. L. Weekly D1453 (Fla. 3d DCA June 17, 1998)(In first degree

[2] This Court in Gore also noted that the dissimilarities were "insubstantial." Other than quoting from Gore, the State has made no effort to show how the dissimilarities Zack presented in his Initial Brief were similarly "insubstantial."

murder prosecution, evidence of four unrelated murders and two attempted murders was relevant only to prove the defendant's bad character or criminal propensities.)

Finally, the State claims this evidence, if wrongfully admitted, had no impact on the jury's verdict. First, erroneously admitting such evidence is presumptively prejudicial "because the jury might consider the bad character thus demonstrated as evidence of guilt of the crime charged." Gore v. State, 23 Fla. L. Weekly S518, 519 (Fla. October 1, 1998). Second, the Rosillo murder and the Chandler thefts were a large part of Zack's trial for the Smith homicide. Accepting the State's figures (Appellee's Answer Brief at p. 30), between 20 percent and 33 percent of the entire trial focussed on improper bad character evidence. In light of this Court's jaundiced view of the harmlessness of such damning testimony, Gore, that was a significant part of Zack's trial. It certainly was not the "proportionately little testimony" the State glibly pronounces it to be. (Appellee's Answer Brief at p. 30.)

Third, the test of harmlessness is not, as the State implies by its recitation of "The evidence upon which the jury could have relied to find Zack guilty . . ." Nor is it measured by "substantial, competent evidence." (State's Answer Brief at pp. 34-35)[3]

[3] Zack also disagrees with many of the "facts" relied on by the State. For example, there is no evidence Zack needed another car, that he lured Smith home, that he immediately attacked her once he got there, that he sexually battered her while she bled on the bed, that she then escaped from there, and was taken into another bedroom where her head was pounded on the floor until her skull cracked. He also disagrees with the

In State v. Diguilio, 491 So. 2d 1129, 1139 (Fla. 1986), this Court explicitly rejected those standards for measuring the harmlessness of an error. "The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test." Instead, "The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected verdict." Id. In this case, this Court can only find the error harmful.

As noted in the Initial Brief at pages 16-17, the extensive evidence of the Rosillo murder and Chandler thefts tended to confuse the jury. It distracted them from the issue of Zack's guilt for the Smith homicide, the crime charged, and by requiring it to also determine his guilt for the uncharged collateral offenses. Steverson v. State, 695 So. 2d 687 (Fla. 1997). The extensive proof introduced of the Rosillo murder naturally inflamed the jury, especially when they saw photographs of Rosillo's body Id. at 690; Henry v. State, 574 So. 2d 73, 75 (Fla. 1991) ("Indeed, it is likely that the photograph alone was so inflammatory that it could have unfairly prejudiced the jury against Henry.").

State's conclusion that after incapacitating Smith he then got a knife and killed her. (Appellee's Answer Brief at p. 35-36.)

2. The Rosillo murder and Chandler thefts were not inextricably intertwined with the murder in Pensacola.

On pages 28-30, the State argues, without much justification, that "Zack's apprehension in Panama City resulted from a chain of events that were so interwoven that extraction of whole blocks of time and conduct would have distorted the events surround Smith's murder, rape, and robbery." (Appellee's Brief at p. 29)That chain was not so interwoven that police investigator Vetter was confused when he questioned Zack about the Smith murder. Zack told him about the events leading up to the murder but omitted the Rosillo homicide. He remained ignorant until the Defendant confessed to the police from Okaloosa County (10 R 768).

On page 30, the State implies that because Rosillo's blood was on clothing found in Smith's car, the two murders were so intertwined that to have separated the facts would have been unwieldy and confusing. What is difficult about telling a crime scene analyst not to mention the clothes with Rosillo's blood when he or she testified? Courts do that sort of editing all the time. See, e.g., Demps v. State, 395 So. 2d 501, 504 (Fla. 1981)(The trial court held that cross-examining a State witness about his " homosexuality was inflammatory and irrelevant and limited questioning to whether he and his lover were 'real good friends.'")

Moreover, every time the State argues by fiat that the Rosillo murder and Chandler thefts were "relevant and necessary" or that they were "inseparable from the Smith murder/rape/robbery" one must ask why were they relevant, how were they inseparable? Other than repeating its mantra of "relevant and necessary" the State provides no answer to those questions. Excluding the Rosillo murder and Chandler thefts would have no more confused the jury than it did Officer Vetter.[4] .

The State, on page 29 of its brief claims Zack supported his "transient lifestyle by ingratiating himself to others and then stealing from them." Of course there is nothing of this in the Rosillo murder. Ms. Rosillo approached Zack looking for cocaine, and the State produced no evidence he ever told her of his past. He also stole nothing from her, nor did he sexually batter her.[5]

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[4] Indeed, trying the cases together introduced a certain amount of confusion because some of the State's witnesses had been involved in the investigation of both murders. For example, the DNA expert, Tim McClure testified about evidence gathered in both murders, and would switch back and forth from the Rosillo evidence to the Smith proof (e.g. 10 R 669-70). DNA testimony has never posed a challenge to a John Grisham pot boiler novel for excitement, so, the opportunity for this important, but boring, testimony to confuse the jury was heightened by allowing evidence of the Rosillo murder to contaminate the Smith trial.

[5] The State, on page 29 of its brief says the evidence strongly suggests Zack raped Rosillo, and that immediately after killing her "he immediately sought his next victim." Both are incorrect. The evidence shows only that sperm was found in her vagina. It was never linked to Zack, nor was there any injury to her vagina (9 R 547), which is significant considering her willingness to fight the defendant. Also, when Zack entered Dirty Jo's, Smith sought him out, as had Rosillo (9 R 549, 11 R 886-87, 904, 907, 8 R 208) From the penalty phase hearing, the absence of any conviction for sexual battery of

3. The other crimes evidence had no relevancy to show Zack's motive in the Smith homicide, sexual battery, or robbery.

As the State admits on page 24 of its brief, Zack's defense to the Smith murder, sexual battery, and robbery, was "one of voluntary intoxication." He claimed to have killed Rosillo, on the other hand, in self defense or mutual combat. "I just wanted her to leave me alone." "I got out of the car, man. We was scrapping." They were swinging at each other (11 R 869-71). She also threatened to "tell her ex-husband," implying he would beat him (11 R 869-70).

Zack's testimony had problems arising from the difficulties he had remembering the fight because he had "been tripping all week." (8 R 870) When questioned by the police, he repeatedly mentioned that he had used drugs, not as a defense, but as an explanation for why he did not recall what had happened. "I really don't remember going in there, no. . . . I'm just recalling bits and pieces of this." (8 R 873) "I can't even remember going to that bar. Tried hard. . . .I 've been pretty tore up this weekend any way." (8 R 862) "I don't remember all of this." (8 R 855) "I'm not saying I didn't do it. . . . I don't know, you know. . . .Maybe I need more time to think." (8 R 859) Drugs clouded his memory but never furnished his defense.

Rosillo suggests that Zack was either never accused of committing that offense or found not guilty of it, if charged.

When he killed Smith, in contrast, he was under the influence of the beer, marijuana, and LSD that he had recently consumed, the effects of which were heightened by his Fetal Alcohol Syndrome, and Post-traumatic Stress Disorder (14 R 1422). The Pensacola crime, in short, scene displayed "a passionate discharge of rage." (14 R 1427)

In the first case, drugs provides a reason for a faulty memory, in the second a defense.

The State, however, muddles the murders with the other thefts he had committed. It somehow wants this court to find his peripatetic thievery somehow explained or shed light on a violent murder. (Appellee's Brief at pp. 24-24). This recitation shows only a petty thief who has made it to the big time. Such relevance, the display of pattern of criminality, has no relevance.

4. The unfair prejudicial impact of this evidence substantially outweighed what ever probative value it may have had.

Or, if it does, its damning, prejudicial value substantially outweighed whatever significance it may have had to show Zack's guilt. As to that argument, the State notes that only 20% to 33% of the State's case in chief related in whole or in part to the Rosillo murder or Chandler theft. It concludes that the prejudicial value of this evidence

failed to outweigh its probative value because "proportionately little testimony []was presented, it cannot be said that it was unduly prejudicial or became a feature of the case. . ." (Appellee's Brief at pp. 33-34) As pointed out in the Initial Brief, collateral crimes evidence that distracts the jury from the issues dealing with the guilt or innocence of the Defendant for the charged crime, and trying him on uncharged offenses become features of his trial.

That is what happened here. The State tried Zack for the Rosillo murder and Chandler thefts. In the Rosillo homicide, the State presented the same witnesses as it used in the Smith murder. The medical examiner testified, as did the DNA analyst, the crime scene technicians, the officers who discovered the body, other investigating officers, and the policeman who interrogated Zack. It introduced 21 pictures of Rosillo's body and the crime scene. As to the Chandler thefts, it presented Chandler's testimony about how he befriended Zack, offering him a job and a place to live. The prosecutor then presented the testimony of the pawnshop owner who bought the guns. Indeed one would be hard pressed to point to other evidence the State could have introduced to have proved his guilt for those crimes.

This extensive proof of the collateral crimes was unnecessary and diverted the jury's attention from the crimes Zack allegedly committed in Pensacola. This damning testimony must have unfairly inflamed the jury to find him guilty for the charged first

degree murder, not so much because he was guilty but as likely to punish him for the collateral crimes. Sexton v. State, 697 So. 2d 833, 838 (Fla. 1997).

Thus, the Rosillo murder and the Chandler thefts in truth were extremely relevant. That evidence was admissible because people who commit two murders within a day should be punished, regardless of what the law says. What they have done is simply too shocking to risk an acquittal or conviction for some lesser offense. That is why the court admitted the Rosillo murder and Chandler theft. Zack was a junior Ted Bundy who was too dangerous to merit a fair trial. That is the only justification for what the court did here.

This court should reject that rationale, reverse the trial court's judgment and sentence, and remand for a new trial.

ISSUE II

THE COURT ERRED IN FAILING TO GRANT ZACK'S MOTION AND RENEWED MOTION FOR A JUDGMENT OF ACQUITTAL ON THE SEXUAL BATTERY CHARGE, A VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

The State makes a good effort to equate the reconstruction of the physical evidence with the start of the fight between Smith and Zack. Human experience, and common sense, admits that often the first blows may result in bloodshed. But not always. Slaps, punches, shoving, and tearing of clothes may precede the spilt blood. Such could have happened here, and nothing the State presented at trial, or argued in its brief, contradicts the Defendant's version of happened. (Initial Brief at p. 35) The State claims, on pages 39 and 40 of its brief that "the violent altercation began in the living room and progressed tot he bedrooms. . . ." What started there were the blood splatters, and while the "bloodshed began" there, no evidence shows the fight erupted in the living room. It could as reasonably have started in the hall, as Zack said it did, and then have progressed to the living room where the "bloodshed began, " as the State contended.

There is likewise no evidence Laura Rosillo was sexually battered, or that she "demanded that he stop the car." (Appellee's Brief at p. 41.)

The State concludes this issue by asserting the unreasonableness of several parts of Zack's explanation. It first contends it was unreasonable for Smith to have taken Zack to her house because her "boyfriend could arrive home at any minute." (Appellee's brief at p. 42) The latter liked to play pool in the evenings, and on this particular night came home some time after 10:30 (8 R 272). Smith had discouraged him from returning home early by calling him from Dirty Jo's and telling (actually lying) him that she had to work late (8 R 219, 298). To her friends, she said she had a "hot date." (8 R 208, 222, 243, 350, 11 R 990). She willingly left the bar with him (8 R 217, 977), and the pair drove around for more than an hour smoking marijuana and engaging in sexual foreplay before going to her home to conclude what they had started at Dirty Jo's (11 R 921, 935). By the time they got to where she lived, her boyfriend was lost in the passion of the moment. There is absolutely no evidence, and only the State's speculation, that "Zack forced her to drive to her home so that he could rape, rob, and kill her." (Appellee's Brief at p. 44, fn. 9.) If such was on his mind, he would have taken her to the beach and killed her there, as he had done with Laura Rosillo. There is likewise no evidence or reasonable inferences that "Smith changed her mind and that Zack raped her."

On page 43 of its brief the State claims "It was not reasonable for the judge or jury to believe" that

1. Before having sex, Smith or Zack ripped her bra, and that she was in too much of a hurry to have sex to take off her shoes and socks.

2. Smith followed the Defendant into the hallway while dressing and made a comment about his mother that sent him into a rage, during which her shirt was ripped.

The State never said why such an explanation would have been unreasonable, perhaps because there is none.

On the same page it contends that it was also unreasonable to argue the fight started in the hallway then progressed to the living, and ended in the bedroom because it was inconsistent with the physical evidence. Zack's explanation, however, is consistent with the proof the State's witnesses produced at trial. He differs only in contending that they had sex before the fight, and the bloodshed started when the fight moved to the living room.

Thus, what the State argues on appeal, like what it contended at the trial level never rebutted Zack's contention that Smith and the Defendant had consensual sexual intercourse. Because his reasonable explanation of the evidence remains valid, this Court must reverse the trial court's judgment and sentence for sexual battery and first degree murder and remand for a new trial.

ISSUE III

THE COURT ERRED IN DENYING ZACK'S MOTION FOR A JUDGMENT OF ACQUITTAL ON THE ROBBERY CHARGE AND SUBMITTING IT TO THE JURY BECAUSE THE THEFT OF THE TV, VCR, AND CAR WERE AN AFTERTHOUGHT AND NOT PART OF THE EVENTS THAT CONSTITUTED THE MURDER, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

On page 47 of its brief , the State claims "[Zack] had been financing his lifestyle previously by ingratiating himself to people like Pope and Chandler, earning their trust, and then stealing from them, justa s he had done with Ravonne Smith." He had not "ingratiated" himself with Laura Rosillo, and more significantly, he had taken nothing from her. There is, moreover, no evidence he had earned Smith's trust. To the contrary, at least according to the State's theory, (Appellee's Brief at p. 44, fn. 9), "Zack forced her to drive to her home so that he could rape, rob, and kill her."

Similarly, there is no evidence he abandoned the car he had stolen from Pope because he had had it too long. (Appellee's Brief at p. 47, fn. 10) He left the car because he thought he had a future with Smith (10 R 790, 11 R 900), and would not need a stolen car.

The State relies on five cases to support its argument on this point, but they have no significance being either factually distinguishable or legally inapplicable. In Finney v. State, 660 So. 2d 674, 680 (Fla. 1995), this Court approved Finney's conviction for

robbery despite his argument that the taking of a VCR was an afterthought to the murder. In doing so this court noted that the Defendant pawned the item within hours. It also deemed significant testimony that he had ransacked the victim's house, taking a jewelry box and dumping the murder victim's purse on the floor. Also, Finney never argued or presented any hypothesis of innocence of robbery.

In this case, while Zack tried to pawn the VCR, there is no evidence he, like Finney, took anything other than the TV and VCR, and ransacked Smith's house looking for other items to sell. Likewise, his argument that the taking was only a theft certainly impressed the court who looked with favor on it. "There's no proof except that the theft of the VCR and TV occurred as an afterthought after the murder took place." (11 R 977) Finney has no controlling value in this case, and stands in contrast to it.

Atwater v. State, 626 So. 2d 1325, 1328 (Fla. 1993), likewise, has little relevance to resolving this issue. There, the murder victim, Smith, had loaned Atwater money in the past, but had told others on the day of his murder that he was afraid of the Defendant and would lend him no more. Shortly before his murder, he had cash in his pockets, but when his body was found, he had none, and his pockets had been turned inside out. Unlike this case, no one, including this Court, was impressed with his "afterthought" defense to the robbery charge.

In Bruno v. State, 574 So. 2d 76, 80 (Fla. 1991), Bruno borrowed a friend's car to get some stereo equipment. He went to the victim's house, and before hitting him over the head with a crow bar admired the electronic setup the victim had. Later he said told another person that he was going back to the victim's house to get some stereo equipment from the person he had killed. Such evidence sufficiently established the robbery and rebutted his argument that the taking was "nothing more than an afterthought."

In this case, Zack never, before the murder, "admired" Smith's VCR or TV, and said he wanted something like it. After he stabbed Smith he realized he need money, and then looked about the house, and "took some items with me, apparently." (10 R 795). Bruno has no significance to this case.

In Marquard v. State, 641 So. 2d 54, 57 (Fla. 1994), the Defendant and a co-Defendant discussed killing the victim and taking her car and money before the trio decided to move from North Carolina to Florida. Somewhere here they did so, and immediately took the vehicle and other property. Such proof rebutted any afterthought defense, and distinguishes it from the facts of this case. The evidence shows only that Zack took the TV and VCR as he fled the house. There is no evidence of any plotting or planning to kill her so he could take the property that until immediately prior to the murder he had no idea she had.

In Jones v. State, 648 So. 2d 669 (Fla. 1994), Jones and the victim left a liquor store together with a third person. Jones later killed and robbed the victim. Apparently, the Defendant never raised an "afterthought" defense to the robbery charge, so that case has no pertinence to resolving this issue.

Contrary to the cases cited by the State in its brief, this Court's opinion in Parker v. State, 458 So.2d 750, 754 (Fla. 1984), has relevance here:

> We cannot accept the findings that the murder was committed during a robbery or that it was especially heinous, atrocious or cruel. Although Parker admitted taking the victim's necklace and ring from her body after her death, the evidence fails to show beyond a reasonable doubt that the murder was motivated by any desire for these objects. The motive expressed at the time of the killing was to keep the victim from implicating the murderers in the death of Richard Padgett. Nancy Sheppard had offered the jewelry to Parker the evening before she was killed as payment for Padgett's debt. Parker refused it at that time and there is no indication that taking it after her death was more than an afterthought, rather than a motive for murder.

Motive, then, becomes the key factor in determining if the defendant's intent at the time of the murder included robbery. In this case, the circumstantial evidence consistently points to the conclusion that Zack went to Smith's house to have sex and possibly a future. Only after the murder, and as he was leaving, did he take the easily

pawned VCR and TV. The evidence supports his contention that the taking remained a theft and never became a robbery.

On page 48 of its brief, the State says, "Thus, evidence independent of Zack's self-serving statements established that Zack had had, at most, six or seven beers between 2:00 and 8:00 p.m., and one marijuana cigarette shared three ways. No one who had contact with him that afternoon and evening described him as intoxicated." Yet, at least one of those witnesses, Mary Bedard, also said Ravonne Smith was similarly not drunk (8 R 215). The medical examiner contradicted her testimony because he found Smith had a .26 blood alcohol content (9 R 515) She was very drunk (12 R 1178-79). Bedard's testimony deserves little consideration, as does, by implication, that of the others who claimed Zack had only "two beers." Either they are lying, or Smith and Zack drank considerably more alcohol after they left Dirty Jo's.

On page 49 of its brief, the State seeks to minimize the importance of Dr. Maher's testimony, the expert Zack called in the guilt phase to testify about the effects of Fetal Alcohol Syndrome, Alcohol, and child abuse on the cognitive abilities of a person to plan and carry out a murder, sexual battery, and robbery. He testified

in response to hypothetical questions because he had not examined the Defendant.[6] His testimony, therefore, was not speculation (Appellee's Brief at p. 49), and it supported Zack's defense that he lacked the intent to rob Smith at the time of the murder.

> Q. Given the alcohol-related birth defects and intoxication experience at age three and the abusive and traumatic childhood and the untimely death of one's mother and acute intoxication at the time someone might do something in terms of killing another individual, what would be that person's ability to plan that event?
>
> * * *
>
> A. Well, it is obviously a general question, but there is no question whatsoever that their capacity to plan and consider whether they wanted to kill a human being would be impaired at that time. They wouldn't have a normal capacity to understand what they were doing, the gravity of it, the feelings of people involved, the importance of doing what was right, not doing what was wrong. They wouldn't have the normal ability to control any impulses, angry impulses that they might have because of something that happened like a normal conversation or an abnormal conversation with another individual.
>
> I mean, the person you have described is a very impaired individual, and their capacity to think about in the most basic kind of way, . . . would be impaired.

[6] Dr. McClaren, the State's expert, likewise had not examined Zack, so neither one diagnosed him.

(12 R 1205-1206).[7]

Zack reiterates here, as he contended in his Initial Brief, that the State failed to prove he robbed Smith. The taking amounted to an afterthought. This Court should, accordingly reverse the trial court's judgment and sentence for the first degree murder and robbery, and the sentence of death and remand for a new trial.

[7] The State says that Dr. Maher "did not opine that someone under those circumstances was incapable of forming the mental state necessary to commit a specific intent crime. . . which is the standard for a voluntary intoxication defense. (T VIII 1472-73). While true, the State could have, but chose not to, asked about Zack's ability to have the specific intent to rob Smith.

ISSUE IV

THE COURT ERRED IN INSTRUCTING THE JURY IT COULD CONVICT ZACK OF FELONY MURDER IF THE UNDERLYING FELONY WAS BURGLARY, AN UNCHARGED AND UNPROVEN CRIME, AND A VIOLATION OF ZACK'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

On page 53 of its brief, the State says "Smith withdrew her consent when [Zack] began his vicious attack and she attempted to escape by running into the second bedroom." There is no evidence she ran there, and it is only the State's speculation that has her doing so. This wishful statement only points out the problem the State has with this issue: Like the State in Miller v. State, 713 So. 2d 1008 (Fla. 1998), it has presented no evidence beyond the facts surrounding the murder to show Ms. Smith withdrew her consent for Zack to be in her house. As this Court held in that case, the prosecution needed more.

As to the harmlessness, the jury returned a general verdict. Under such circumstances, they could have based it on a felony murder theory in which the underlying felony was burglary. In such instances, the error in instructing on that offense could not have been harmless. C.f., Yates v. Evatt, 500 U.S. 391 (1991).

This Court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE V

THE COURT'S SENTENCING ORDER IS DEFICIENT IN THAT IT FAILED TO CONSIDER ALL THE MITIGATION ZACK PRESENTED IN SUPPORT OF A LIFE SENTENCE, AND THE CONCLUSIONS IT REACHED WERE AT ODDS WITH THE EVIDENCE PRESENTED BY THE STATE AND DEFENSE, IN VIOLATION OF ZACK'S EIGHTH FOURTEENTH AMENDMENT RIGHTS

The State's reliance on this Court's opinion in Blanco v. State, 706 So. 2d 7, 10-11 (Fla. 1997), typifies its and the trial court's treatment of the mitigation in this case. It has taken what it wanted from the opinion and ignored the larger part of what this Court said in that case regarding a trial court's consideration of the mitigation presented in a capital case. On page 54 of its brief, the State characterizes Zack's Campbell[8] argument as nothing more than an attack on the weight given the mitigating evidence. It quotes from Blanco, "This Court recently reaffirmed, however, that 'the weight assigned to a mitigating circumstance is withing the trial court's discretion and subject to the abuse of discretion standard.' Blanco v. State, 706 So. 2d 7, 10-11 (Fla. 1997)."

While an accurate quote, it is incomplete. This is what this Court said in that case:

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[8] Campbell v. State, 571 So. 2d 415 (Fla. 1990).

> The Court in Campbell v. State, 571 So.2d 415 (Fla.1990), established relevant standards of review for mitigating circumstances: 1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; 2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard; and finally, 3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.

(Footnotes omitted.)

As to the first standard of review, on pages 61 and 62 of the Initial Brief, Zack listed several mitigating factors this Court has recognized as such, yet the trial court failed to mention. As to the second standard, along with those factors, he provided page references to justify finding them as mitigation. To this, the State says that "When read in its entirety, however, the court's sentencing order reveals that all of this information was considered and analyzed in relation other mitigation." (Appellee's brief at p. 66)(Emphasis in Answer Brief) That is not what this Court required in Campbell: "When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant... ." Id. at 419. The trial court never did that. Zack presented competent, substantial proof justifying each mitigator so the court had no discretion but to find them. In Morgan v. State, 639 So. 2d 6 (Fla. 1994) this Court

found that the lower tribunal should have found both statutory mental mitigators, and, as additional mitigation, that Morgan had sniffed gasoline for many years and had done so on the day of the murder.[9] Similarly, in Knowles v. State, 632 So. 62, 67 (Fla. 1993), because the State had presented nothing rebutting the Defendant's evidence of his mental deficiencies, this Court concluded the trial judge "erred in failing to find as reasonably established mitigation the two statutory mental mitigating circumstances, plus Knowles' intoxication at the time of the murders. ." (Emphasis supplied.)

In Spencer v. State, 645 So. 2d 377 (Fla. 1994), this Court concluded the trial court had erred in ignoring the two statutory mitigators in its sentencing order even though it found the Defendant was a chronic alcoholic and had abused other substances as well as being paranoid. Thus, this Court has held contrary to the State's assertion on page 66 of its brief that "As the State is not allowed to use the same evidence to support more than one aggravator, the defendant should not be allowed to use the same evidence to support multiple mitigators." A trial court may not rely on the same aspect of a crime or the defendant's character more than once, but it may use the same evidence repeatedly to support different mitigators.

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[9] It also concluded he had no history of violence, was 16 years old at the time of the crime, he had a low intelligence and was extremely immature. Id. at 14.

The State says on page 63 of its brief that "the trial court minimized the weight of the evidence of Zack's family's dysfunctional family and abusive childhood "because of the motivation the family and friends had to embellish allegations of child abuse." What motivation? There is no evidence any of Zack's witnesses had any reason to lie for the Defendant. Theresa McEwing, the sister who was declared insane, had no apparent motive to help the brother she had not seen for years. Neither did the Anglemeyers. Neither did the doctors who warned about returning Zack to Midkiff's custody after he had spent a year in a mental hospital. Neither did the psychologists who found no malingering in Zack (16 R 1840, 17 R 1991, 2018). Instead they diagnosed him as suffering from brain damage, with a skewed perception of reality, an emotional age of ten and an mental age of fifteen, who was an alcoholic and drug addict, among other deficiencies. There is no evidence any of Zack's witnesses had any motivation to lie for a person they barely knew or had not seen for years. To the contrary, family members have a natural tendency to hide evidence of abuse because of the shame and guilt it produces. If anything, what they said at the sentencing hearing probably was a sanitized version of what Midkiff did.

In the same vein the State seems to imply that Zack's maternal aunt skewed her testimony about the abuse because "defense counsel told her that Zack's expert witnesses would rely on allegations of child abuse." Again, there is not a scintilla of

proof she lied. On the other hand, Midkiff was apparently available to testify at Zack's penalty phase, yet the State never called him to rehabilitate his reputation (12 R 1048-53). Why not? If the State wanted to rebut Zack's fabrications why did it not call Midkiff, the author of the beatings, rapes, and tortures his children, associates, and psychologists had witnessed or reported for years. It found Candace Fletcher and brought her from Oklahoma. Why not Tony Midkiff? His stench still fouled the world because during Zack's trial he threatened Ziva Knight, one of Zack's sisters, to "have my baby--my little boy taken from me" if she testified (15 R 1784-85).[10]

On page 64 the State said that Theresa McEwing, Zack's half sister, "admitted that she had spent an unknown number of years in a mental institution." All this supports the State's contention that life with Tony Midkiff was not that bad.[11] Yet, of the three children he "raised" two spent time in a mental hospital, and the third, was regularly raped by Midkiff. She eventually ran away to avoid being sexually

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[10] When Midkiff learned of Zack's arrest, he told Knight "Well, [the] little bastard finally hung himself, give him a little bit of string, he going to hand himself, and he finally did it." 15 R 1785)

[11] On page 65 of its brief, the State notes the inherent logical inconsistency between Midkiff abusing Zack mercilessly as a child and Zack living with Midkiff as a young adult." While such may be logically inconsistent to mentally healthy persons, such is not the case for those who have been abused. See footnotes 38 and 39 of the Initial Brief.

battered (15 R 1780, 1783). Life with that man was hell, and the State's efforts to portray it as, well not quite heaven, flop. Zack presented witnesses who had personally seen or suffered from Midkiff's abuse. None of it was hearsay. Moreover, none of the State's rebuttal witnesses, particular Dr. McClaren, ever denied the reality of the prolonged, perpetual abuse Zack and his sisters testified happened at the hands of Midkiff. When questioned on direct examination by the prosecution, the State hired psychologist said:

> I believe this man is dependent on alcohol and cannabis. ... I believe he probably could be diagnosed as suffering from post-traumatic stress disorder based on child abuse that he experienced -- that I believe that he experienced, and also learning of the violent death of his mother at the hands of his sister. And that he is troubled by memories of these traumatic events. . . . [H]e was raised in an unstable, abusive environment.

(17 R 2022)

> [T]his man's life has been a life of emotional disturbance.

(17 R 2032)

Thus, to give little or no weight to the abuse Zack suffered as a child, and from whose effects he continues to suffer (9 R 592-96), was a clear abuse of discretion. No evidence supports the trial court's rejection of Zack's overwhelming case for mitigation.

In short, the court never considered the combination of FAS, PTSD, and drugs and alcohol. When asked about that even Dr. McClaren, the State's expert, admitted that "the more that some of these problems stack up, the more likely people are to become violent." (17 R 2042) Dr. Crown was more pessimistic. Combining FAS, PTSD, with drugs and alcohol "exacerbates [the tendency to criminal behavior] to the extreme." (16 R 1923-24) Nothing the State presented rebutted, in the slightest, those conclusions. The trial court's sentencing order is a good example of the product of a judge who has been to a judge's conference on the death penalty, heard the law but missed the message. Death sentencing orders must be a "thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty. . . . If the trial court does not conduct such a deliberate inquiry and then document its findings and conclusions, this court cannot be assured that it properly considered all mitigating evidence." Hudson v. State, 708 So. 2d 256 (Fla. 1998).

This Court must reverse the trial court's sentencing order and remand for it to enter an order that complies with the guidance it has repeatedly given to it to follow.

ISSUE VI

THE COURT ERRED IN FINDING THE MURDER TO HAVE BEEN COMMITTED "FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST," AS THERE WAS INSUFFICIENT EVIDENCE SUPPORTING THAT AGGRAVATING FACTOR, A VIOLATION OF ZACK'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Much of what the State says arguably shows that Zack had a cold, calculated, and premeditated plan to steal. But such intent does not equate with a cold, calculated, and premeditated motive to kill. Hardwick v. State, 461 So. 2d 79 (Fla. 1985). He may have taken weeks to ingratiate himself with Edith Pope so he could steal her car. He may have spent days becoming Bobby Chandler's friend to steal his guns. But there is no evidence he did so with Laura Rosillo in part because he never took anything from her, although her body had rings on it.[12]

On page 69 of its brief, the State claims "Appellant knew the car had been reported stolen and could tie him to the Russillo rape/murder. . ." There is no evidence that the Honda could have been linked to the Rosillo murder.

The State, by way of footnote on page 70 of its brief, tries to distinguish the cases Zack cited in his Initial Brief. First, while facts of those cases may be different

[12] There is also absolutely no evidence Zack raped her, contrary to the repeated assertions of the State on appeal.

from this case that misses the point. Zack presented them to illustrate the difficulty the State has in showing the "dominant motive" for a particular murder was to avoid lawful arrest. It must present positive evidence that the sole or dominant reason for committing a murder was to avoid arrest. The avoid lawful arrest aggravator is not some sort of default that applies whenever a court can think of no other reason the defendant may have killed someone.

Also, what the State says about the cases it cited is misleading. For example, it claims the defendant in Garron v. State, 528 So. 2d 353 (Fla. 1988), shot his daughter as she tried to call the police to "eliminate her as a member of his family." There is nothing in that opinion to support that speculation. This Court said "there is no proof as to the true motive for the shooting of Tina. Indeed, the motive appears unclear."Id. at p. 360. If that evidence fails to meet this Court's "dominant motive" requirement, what the State presented in this case also falls short.

The State's discussion of Livingston v. State, 565 So. 2d 1288 (Fla. 1990), also omitted several important facts. First, after shooting one clerk at a convenience store, Livingston went to the back to shoot a second one. On the way there he said, "Now I'm going to get the one in the back [of the store.]" Even with those facts, this Court rejected finding that Livingston's dominant motive in murdering the first clerk was to eliminate her as a witness to his robbery.

The State distinguishes Doyle v. State, 460 So. 2d 353 (Fla. 1984), by arguing that "Zack knew that Pope had reported [the Honda] stolen. Moreover, Zack knew that the Honda could tie him to the Chandler thefts and, more importantly, the Russillo rape/murder. Thus, the threat of arrest and incarceration was far more real and likely to Zack than to Doyle were he to leave Smith alive after raping and beating her." First, Rosillo was not raped. Second, there was no evidence Zack believed, or had grounds to believe, the Honda could have tied him to the Rosillo murder. Third, why would he abandon the Honda that apparently had been reported stolen in Tallahassee for a car that assuredly would be reported stolen in Pensacola? If Zack wanted to avoid arrest he would not have taken Smith's car that definitely could have been tied to the Smith homicide.

The State cites several cases on page 69 of its brief for the proposition that a desire to eliminate a witness to another crime can support the witness elimination aggravator. But, if that were blindly applied, every felony murder would have this aggravator, a position this Court has obviously rejected. Thus, if we examine the State's cases we quickly find a more discriminating application than what the State advocates. For example, In Sweet v. State, 624 So. 2d 1138, 1142 (Fla. 1993), the defendant had robbed a woman about three weeks before he burst into her apartment, spraying it with bullets. Significantly, on the same day as the homicide he saw her

talking to a policeman, and after his arrest he made statements indicating his intent. In this case, Zack's rape/robbery were contemporaneous with the murder, he had no idea if Smith would have reported the assault, and after his arrest he never said he killed her to eliminate her as a witness. Accord. Hodges v. State, 595 So. 2d 929 (Fla. 1992).

In Henry v. State, 613 So. 2d 429 (Fla. 1992), Henry was the maintenance man for the store in which he tied up two employees, eventually hitting them over the head with a hammer and setting them on fire. He intended to rob them, but had to kill them because they knew him. Such was not the case here. While Smith may have known Zack, he was still largely a stranger to her. She had about as much important, identifying knowledge of him as she would have had had he picked her up as she walked on the road. Certainly he had none of the ties or familiarity Henry had with his victims. Accord. Lightbourne v. State, 438 So. 2d 380 (Fla. 1983).

The State has presented nothing in its argument on this issue that weakens or destroys what Zack contended in his Initial Brief. The State introduced insufficient evidence that his sole or dominant motive in killing Smith was to avoid lawful arrest. This Court should, therefore, reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE VII

THE COURT ERRED IN FINDING THE MURDER TO HAVE BEEN COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL JUSTIFICATION, A VIOLATION OF ZACK'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

First, the State's misstatements or speculation. On pages 74 and 75 of its brief, it says Rosillo was raped. There is no evidence of that. There is no evidence that was a "goal" of his. There is no evidence he stole anything from her. There is no evidence he told his life history to her. On page 76, the State claims the Honda could be traced to the Rosillo murder. There is no evidence of that. On the same page it claims that none of Zack's experts believed it was important to know how Zack behaved and function preceding and following the murder. The Initial Brief at pages 52-55 refutes that. On the same page it also argues that everyone who saw Zack on the day of the murder and after "described him as relaxed and sociable. The Initial Brief at pages 59-60 refutes that. There is no evidence that "he ever contemplated and premeditated his plan to rape, kill, and rob [Smith.]" (Answer Brief at p. 75)

Admittedly Zack is a thief, but cold, calculated and premeditated planning to steal does not equate with cold, calculated, and premeditated plans to murder.

Hardwick v. State, 461 So. 2d 79 (Fla. 1985). So, much of what the State argues here (beyond what it speculates) has relevance only to show that he was a small time thief.

Beyond the speculation, the State's argument has some serious logical flaws. If Zack had spent most of the day planning to kill his next victim, he would not have picked a barmaid, and he certainly would not have done so at the place she worked. Such persons have ties to other people who would check on missing co-workers, employees, and friends, particularly when they fail to show up for work. Peterka v. State, 640 So. 2d 59, 63 (Fla. 1994). They also tend to know what type of cars they drive. Cold blooded killers likewise would not drive around Pensacola for a couple of hours with a third person who could identify him. They also would kill their victims in remote locations, not in their houses. They also would take knives or preferably guns with them. They would not rely on the fortuity of quickly finding a knife (and a small, dull one at that) at the victim's home to commit the murder. They would not abandon a car stolen days earlier and hundreds of miles away in favor of taking another that would be immediately tied to a local homicide. Indeed, in this case, Smith's car was quickly reported stolen and that notice became the basis for arresting Zack (10 R 747-49).

Beyond the logical problems in the State's argument, its reliance on this Court's opinion in Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), has problems.

First, Zack's confession to the Smith murder never substantially changed. Wuornos gave several "constantly changing confessions." Second, unlike Wuornos, Zack had to rely on whatever weapon he could find at Smith's house. He did not arm himself either to steal or kill. Moreover, he did not lure Smith to an isolated location. Finally, there is no evidence of any deliberate ruthlessness above that found in an unaggravated first-degree murder.

This Court should reverse the trial court's sentence of death and remand for a new sentencing hearing before a new jury.

ISSUE VIII

THE COURT ERRED IN USING THE VICTIM IMPACT EVIDENCE PRESENTED BY THE STATE IN THE PENALTY PHASE PORTION OF ZACK'S TRIAL TO JUSTIFY FINDING THE MURDER TO HAVE BEEN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, AND IN ALLOWING THE PROSECUTION TO TELL THE JURY IT COULD GIVE WHATEVER WEIGHT IT WANTED TO THAT EVIDENCE, A VIOLATION OF ZACK'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

What Ms. Smith's mother said at the sentencing hearing when she gave victim impact evidence is the contested issue here. She told the jury that she had never felt like she was "able to say goodbye to [her] daughter." Explaining why, she continued:

> When we had Vonnie's viewing and I looked at her at the funeral home, I said I can't say goodbye, this does not look like my daughter. And I held that thought because every time the phone rang for at least six or eight weeks after that, it was Vonnie calling me. Because that wasn't her. And she'd say Mama, I'm sorry that you've been worried, but that wasn't me in my house, I was on vacation and somebody else was there.

(15 R 1625).

Mrs. Smith's poignant testimony was of a grieving mother having a difficult time saying goodbye to a loved daughter. It had nothing to do with "Ravonne Smith's face [being] so badly beaten that her own mother refused to believe that it was her daughter." (Appellee's Brief at p. 83). The court, in any event, did not need the

mother's testimony to "relate the extent of Zack's infliction of pain and suffering on the victim." Id. The medical examiner did, or could have done, that. See, Justus v. State, 438 So. 2d 366 (Fla. 1983)(When possible, witnesses other than the victim's family should be called to identify the victim of a murder.)

This Court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE IX

THE COURT ERRED IN ADMITTING, AS THE STATE'S REBUTTAL CASE, THE TESTIMONY OF CANDICE FLETCHER, ZACK'S FORMER GIRLFRIEND, THAT MENTIONED ALLEGED, BUT UNCHARGED CRIMES, THAT MADE CONCLUSIONS ONLY A MENTAL HEALTH EXPERT COULD REACH, AND THAT CONTAINED HEARSAY ABOUT WHY A MENTAL HEALTH CENTER REFUSED TO TREAT HIM, ALL OF WHICH VIOLATED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

In his Initial Brief, Zack presented three reasons the trial court erred in admitting the testimony of Candace Fletcher at his sentencing hearing: (1) The evidence that Zack had stolen from his stepfather was improper bad character evidence. (2) Candace Fletcher was unqualified to testify that the relationship between Midkiff and Zack was one "you would expect between a stepfather and his son." (3) The mental health center would have nothing to do with Zack because he would not conform to any treatment program.

As to the first argument, the State answers on page 86 of its brief that "Thus, Fletcher's testimony was proper to rebut Zack's testimony that his stepfather severely abused him through his life and that Zack had repeatedly sought psychological help, but was consistently put off." Apparently the argument on appeal goes something like this: Tony Midkiff beat, burned, tortured, and repeatedly tried to kill his stepson,

as a child, because he would steal from him as an adult. There is absolutely no evidence Midkiff's abominable, criminal abuse of this young boy, in any way, arose from, or was "justified" by any thievery by Zack as a child. That makes little sense.

More potent, at closing argument it said, "Anthony Midkiff cut [Zack] off because he was being victimized by the defendant." (17 R 2080). In other words, the stepfather kicked him out of the house because the latter was a thief. Zack has a bad character or the propensities of a thief.

Unlike the guilt phase of a trial, the penalty trial is, in part, an analysis of the defendant's character. Lockett v. Ohio, 438 U.S. 586, 604 (1977); Eddings. v. Oklahoma, 455 U.S. 104 (1982). In Florida, to control the sentencer's discretion, that character examination finds definition through the aggravating and mitigating factors. Specifically, convictions for prior violent felonies tends to justify a death sentence while a lack of a substantial criminal history mitigates against imposition of that punishment.

In this case, Fletcher only alleged Zack had stolen from his stepfather. There is no evidence the Defendant ever was convicted of any crime against him. Also, thievery is not a violent offense that would have justified the prior violent felony aggravator.

Nor does this evidence rebut any defense that he had no significant history of criminal history. He never indicated he intended to argue it, and without some evidence to support that mitigator the State cannot rebut it. See, Maggard v. State, 399 So. 2d 973, 977 (Fla. 1981).

Hence, the State could not present this character evidence because it only portrayed him as a thief.

As to Zack' second argument, regarding her opinion about his relationship with his father, it contends first he had waived his objection because the State had already asked Fletcher the nature of Zack's contact with Midkiff twice previously. (Appellee's Brief at p. 86). The questions, however, followed each other, and were not asked minutes or pages earlier:

> Q. And if you would, describe to the members of the jury the nature of that contact.
>
> A. He lived with him when I first met him, and it was nothing out of the ordinary really.
>
> Q. And after he started living with you, did the defendant ever go and visit or socialize with Tony Midkiff?
>
> A. Yes, he did.
>
> Q. Were you able to observe the two of them together interact with one another?
>
> A. Yes.
>
> Q. Did there Appear to be anything strange or unusual about that relationship?
>
> A. No.
>
> Q. Was the relationship one that you would expect between a stepfather and his son?

A. Yes.

MR. KILLAM: Judge, this witness is not qualified to make that kind of a statement. She's not a psychologist.

THE COURT: Overruled.

(17 R 2052)

As evident by the court's ruling rejecting Zack's objection, Zack would have engaged in a futile act to have complained about the previous questions and responses. In any event, the State at the trial level never raised the issue it now claims precludes this Court's review, and the lower court never considered the objection as waived. To the contrary it ruled on the merits of Zack's claims. Thus, without preserving the issue it now presents to this Court, the State itself has waived any contemporaneous objection it may have had. Cannady v. State, 620 So. 2d 165 (Fla. 1993); State v. Dupree, 656 So. 2d 430 (Fla. 1995)(The State is bound by the same rules as the Defendant, and issues not raised at the trial level by the State cannot be raised on appeal for the first time.) The questions were so close to one another, that to have objected immediately after the final response does not somehow waive the issue. The contemporaneous objection rule has never required counsel to make an instantaneous evaluation of the damage of a question and answer and immediately object. Trial tactics may have dictated that he would let one question slide by without

bringing attention to it. But when the State would not let go of the subject but hit it again and again counsel had to object.

As to the merits of this point, the State contends that it never asked Fletcher for an "opinion that called for a psychological conclusion." It was merely asking her to relate her impression of how Zack and his stepfather interacted when they were together. This was not an improper question." (Appellee's Brief at p. 87). Supporting that conclusion, it cites Strausser v. State, 682 So. 2d 539, 541 (Fla. 1996), and Occhicone v. State, 570 so. 2d 902, 906 (Fla. 1990). In both of those cases, this Court approved questions about the Defendant's mental condition observed only hours after the murders they had committed. Garron v. State, 528 So.2d 353 (Fla.1988); Rivers v. State, 458 So.2d 762 (Fla.1984). (Nonexperts may testify as to a defendant's mental condition based on personal knowledge of the defendant gained in a time period reasonably proximate to the events giving rise to the prosecution.) Here, the State never asked Fletcher to testify about Zack's mental condition at some discrete time. Instead, as pointed out in the Initial Brief at page 88, " [T]he State wanted her to reflect on events that had presumably taken place over a two year period (at least six years before trial), and synthesize some sort of generalized conclusion based on her overall impression of Midkiff's and Zack's

relationship." No case from this Court has ever permitted that, and this one should not.

As to the State's argument on the inadmissible hearsay, Zack finds nothing in the States answer brief that needs a reply from him. The Initial Brief adequately covered this point. This Court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

CONCLUSION

Based on the arguments presented here, Michael Zack respectfully asks this honorable Court to 1) reverse the trial court's judgment and sentence and remand for a new trial, 2) reverse the trial court's sentence of death and remand for a sentencing hearing before a jury, or 3) reverse the trial court's sentence of death and remand for resentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to SARA D. BAGGETT, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL 32399-1050; and a copy has been mailed to appellant on this _____ day of December, 1998..

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

_____
DAVID A. DAVIS
Assistant Public Defender
Fla. Bar No. 0271543
Leon County Courthouse, Ste. 401
301 South Monroe Street
Tallahassee, FL 32301
(850) 488-2458
ATTORNEY FOR APPELLANT